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In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF ALASKA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 28(b) of the Alaska Statehood Act constitutes a contractual promise by Congress that the State of Alaska shall have an irrevocable right to receive in perpetuity 90 percent of gross proceeds derived from mineral leasing on public lands in Alaska.

2. Whether Section 28(b) of the Alaska Statehood Act constitutes a contractual promise by Congress that the United States shall assume an affirmative duty to exploit public lands in Alaska for mineral development in order to generate royalty revenues for the State.

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OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1a) is unpublished, but the decision is noted at 119 F.3d 16 (Table). The opinion of the Court of Federal Claims (Pet. App. 2a-46a) is reported at 35 Fed. Cl. 685.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1997. Pet. App. 47a. On September 22, 1997, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 5, 1997 (Pet. App. 48a), and the petition was filed on October 31, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Mineral Leasing Act of 1920 (MLA), 30 U.S.C. 181 *et seq.*, grants the Secretary of the Interior broad, discretionary power to issue leases for specified minerals, including oil and gas, on public lands. 30 U.S.C. 181; see *Udall* v. *Tallman*, 380 U.S. 1, 4-5 (1965). When the Secretary decides to open public lands for mineral leasing, Section 35 of the MLA directs the federal government to distribute the majority of the proceeds for the benefit of the States. 30 U.S.C. 191.

As originally enacted, Section 35 provided for 37½ percent of such revenues to be paid to the State in which the leasing occurred (with such funds to be used by the State for support of public roads and education); 52½ percent to be paid into the federal "reclamation fund" for financing irrigation projects under the Reclamation Act of 1902, 43 U.S.C. 372 *et seq.*; and the remaining 10 percent to remain in the United States Treasury, credited as miscellaneous receipts. Act of Feb. 25, 1920, ch. 85, § 35, 41 Stat. 450-451. Under the 1920 version of the Act, the Territory of Alaska was effectively excluded from that revenue-sharing scheme.

In 1947, Congress amended Section 35 of the MLA to bring the Territory of Alaska within the ambit of the 37½ percent share, which had previously been extended only to States. See Act of May 27, 1947, ch. 83, 61 Stat. 119. Because the Territory of Alaska was not eligible for irrigation projects under the Reclamation Act, however, the remaining proceeds derived from mineral leasing in Alaska were simply credited to the United States Treasury as miscel-

laneous receipts. See 30 U.S.C. 191 (1952) (Pet. App. 74a-75a).

In the mid-1950s, while Congress was evaluating various proposals for admitting Alaska to the Union, it considered several bills that were intended to address—separate and apart from statehood—the perceived disparity in Alaska's treatment under the MLA vis-à-vis the States that were eligible to receive irrigation projects under the Reclamation Act. In 1957, Congress enacted one of those bills. See Act of July 10, 1957, Pub. L. No. 85-88, 71 Stat. 282 (Public Law 85-88) (Pet. App. 75a-76a).

Public Law 85-88 amended Section 35 of the MLA to increase Alaska's share of MLA proceeds effectively to 90 percent: it granted the territorial legislature an unrestricted 52½ percent share in addition to the 37½ percent share (specifically designated for roads and schools) to which the Territory had already been entitled. The amendment was intended to eliminate the "unfairness" of Alaska's inability to benefit from the 52½ percent share which, in the case of mineral leasing on public lands in the States, was paid into the federal reclamation fund. Pet. App. 15a-16a.

2. In July 1958, Congress passed the Alaska Statehood Act (ASA), Pub. L. No. 85-508, 72 Stat. 339 (codified at 48 U.S.C. Ch. 2), thus paving the way for Alaska's admission into the Union. The Act contained the most generous terms for admission of a new State in the history of the United States. See S. Rep. No. 1163, 85th Cong., 1st Sess. 2 (1957) (C.A. App. A224). Most significantly, it granted the State of Alaska the right to select 103,350,000 acres of land from the public domain. That public land grant was unprecedented, not only for its enormous size (more than 161,000 square miles, an area larger than any

State in the Union except Texas), but also for the absence of traditional restrictions on the State's selection and disposal of such lands and for the express *inclusion* of mineral lands.[1]

The ASA contains 30 sections. The first 11 sections set out the terms and conditions under which Alaska would be admitted into the Union. The majority of the remaining sections addressed various administrative aspects of the transition from territorial status. Sections 4, 5, 6, 8 and 28 are the most pertinent here.

Section 4 of the ASA is the only section that uses the term "compact." It contains a general disclaimer by which Alaska and its people, "[a]s a compact with the United States," *inter alia*:

> forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States.

72 Stat. 339 (Pet. App. 49a-50a). Section 4 further provides that "all such lands or other property[] belonging to the United States * * * shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has

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[1] In land grant provisions in previous statehood acts, new States were typically limited to specifically designated sections in each township, with the right to select other lands only if the designated sections were unavailable at the time of survey. *Andrus* v. *Utah*, 446 U.S. 500, 506-507 & n.7 (1980). Furthermore, mineral lands were historically excluded from such land grants. *Id.* at 508-509.

prescribed or may hereafter prescribe." *Ibid.* (Pet. App. 50a). Section 5 makes clear that, "[e]xcept as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands." *Id.* at 340 (Pet. App. 50a-51a).

Section 6, *inter alia*, set forth specific grants of land and other property. For example, Section 6(a) and (b) granted Alaska the right to select up to 102,550,000 acres of public lands that are "vacant, unappropriated, and unreserved at the time of their selection" and to select an additional 800,000 acres (including 400,000 acres from national forests) for purposes of community expansion and development. 72 Stat. 340 (Pet. App. 51a-52a). Section 6(i) gave the State the right to select public lands with mineral deposits and required the State to retain title to the mineral rights in perpetuity. *Id.* at 342 (Pet. App. 56a). In addition to grants of land, Section 6 included various revenue-sharing provisions, directing payment to the State, for instance, of 70 percent of net proceeds from the sale of seal and otter skins on the Pribilof Islands (§ 6(e), 72 Stat. 341 (Pet. App. 53a)), and 5 percent of net proceeds from the sale of public lands in Alaska (§ 6(f), 72 Stat. 341 (Pet. App. 53a-54a)).

Section 8 of the ASA called for the holding of a public referendum on three propositions, the third of which is relevant here. Under the third proposition, the voters of Alaska would decide whether they "consented * * * fully" to:

> All provisions of the [ASA] * * * reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the

> grants of lands or other property therein made to the State of Alaska.

§ 8(b), 72 Stat. 344 (Pet. App. 58a-59a). If the voters approved all three propositions, Section 8(c) required the President to issue a proclamation to that effect, and upon such proclamation Alaska would be admitted into the Union. 72 Stat. 344 (Pet. App. 59a). If any one of the above propositions were defeated, however, the ASA would not take effect. § 8(b), 72 Stat. 344 (Pet. App. 59a).

Sections 12 through 28 of the ASA, 72 Stat. 348-351 (Pet. App. 66a-73a), addressed various administrative and technical changes that would have to be made in other laws to facilitate Alaska's transition from a Territory to a State. Sections 12 through 18, for instance, contained numerous amendments to Title 28 of the United States Code that were necessary to bring Alaska within the federal court system. Sections 19 through 28, the Act's "miscellaneous provisions," S. Rep. No. 1163, *supra*, at 28 (C.A. App. A237), amended various other statutes to reflect Alaska's new status as a State. See, *e.g.*, § 19 (amending Federal Reserve Act); §§ 21-26 (Immigration and Nationality Act); § 27 (Merchant Marine Act, 1920), § 28 (Alaska Coal Lands Act and Mineral Leasing Act).

Section 28(b) of the ASA—the basis for Alaska's claims in this case—amended Section 35 of the MLA to reflect Alaska's new status as a State. At the time of the ASA's passage, the pertinent clause in Section 35 of the MLA read as follows: "and of those from Alaska 52½ per centum therof shall be paid to the *Territory* of Alaska for disposition by the legislature of the *Territory* of Alaska." 30 U.S.C. 191 (Supp. V

1952 ed.) (emphasis added).[2] In full, Section 28(b) of the ASA provided:

> Section 35 of the [MLA] is hereby amended by inserting immediately before the colon preceding the first proviso thereof the following: ", and of those from Alaska 52½ per centum thereof shall be paid to the *State* of Alaska for disposition by the legislature thereof".

72 Stat. 351 (Pet. App. 73a) (emphasis added). Thus, the sum total of Section 28(b)'s revision was to substitute the words "State of Alaska" for "Territory of Alaska" in one clause of Section 35 of the MLA.[3]

On August 26, 1958, the Alaskan people approved all three propositions in the statehood referendum, and on January 3, 1959, President Eisenhower proclaimed Alaska a State. Pet. App. 23a. The date of statehood was also the effective date of Section 28(b)'s amendment to the MLA. See 30 U.S.C. 191 note. As noted above, however, Alaska had been receiving a 90 percent share under the MLA since July 1957, when Congress amended the MLA through Public Law 85-88. Thus, from July 1957 to the present, Alaska's share of MLA proceeds has remained constant at 90 percent.[4]

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[2] This version of Section 35 includes the July 1957 amendment effected by Public Law 85-88, which raised the Territory of Alaska's total share of MLA proceeds to 90 percent. See page 3, *supra*.

[3] Similarly, Section 28(a) amended one clause in the Alaska Coal Lands Act of 1914 so that it would apply to the "State" rather than the "Territory" of Alaska. 72 Stat. 351 (Pet. App. 73a).

[4] While Alaska's percentage share under the MLA has remained constant, the rate at which the United States has

3. In the early 1990s, Congress enacted several measures affecting the method of calculating the States' respective shares under the MLA. In appropriations legislation for fiscal year 1991, for instance, Congress directed the Secretary of the Interior to deduct a portion of the administrative costs for the MLA program prior to calculating the States' shares under Section 35. See Department of the Interior and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-512, 104 Stat. 1926 (1990). Congress enacted similar provisions in fiscal years 1992 and 1993. See Department of the Interior and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-154, 105 Stat. 1001 (1991); Department of the Interior and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-381, 106 Stat. 1385 (1992).

Those measures were motivated by a long-standing concern that States were not sharing equitably in the costs of administering the federal mineral leasing program. See, *e.g.*, H.R. Rep. No. 253, 98th Cong., 1st Sess. 36-37 (1983) (C.A. App. A787). In 1993, Congress enacted those changes on a permanent basis, amending Section 35 of the MLA so that, from that point forward, 50 percent of the government's administrative costs in running the mineral leasing program

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made new lands in Alaska available for leasing has declined, at least since 1966. Pet. App. 23a. That reduction is largely a result of the fact that selections by the State and by Alaska Native corporations have removed some of the most productive lands from the public domain. See *United States* v. *Atlantic Richfield Co.*, 435 F. Supp. 1009, 1017-1019 (D. Alaska 1977) (noting that, in 1964 and 1965, Alaska selected 1,650,000 acres on the Arctic Slope, including the immensely valuable oil fields in Prudhoe Bay), aff'd, 612 F.2d 1132 (9th Cir.), cert. denied, 449 U.S. 888 (1980).

would be deducted "prior to the division and distribution of such receipts between the States and the United States." 30 U.S.C. 191(b)(1) (Pet. App. 77a-78a); see Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 10201(3), 107 Stat. 407.

4. In July 1993, Alaska filed the instant action in the United States Court of Federal Claims (CFC). C.A. App. A46-A58 (Complaint). Alaska's claims were premised on the assertion that Section 28(b) was an integral part of a "compact" or "contract" that the United States formed with the people of Alaska upon Alaska's admission into the Union. In particular, Alaska claimed that Section 28(b), construed as a contract provision, contains the following two enforceable promises: (1) that Alaska would be granted an irrevocable right to receive in perpetuity 90 percent of *gross* proceeds earned under the MLA; and (2) that the United States would assume an affirmative duty to undertake mineral leasing on public lands in order to generate sufficient royalties for the State. See Pet. App. 27a.

In Counts 1 to 3, Alaska asserted that the United States "breached" the second of those alleged promises "by repeatedly withdrawing more than one-hundred million (100,000,000) acres of federal land from mineral leasing within Alaska, thereby precluding generation of revenues for Alaska." Complaint ¶ 20 (C.A. App. A52).[5] Alaska claimed that it

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[5] According to Alaska, Congress committed that breach when it enacted the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371 (1980), which withdrew from potential mineral location and development various wild and scenic rivers, national parks, and wilderness preserves, and withdrew from future mineral leasing, among other areas, the Yukon-Charlie Rivers National

was entitled to money damages "[t]o the extent the withdrawn lands would have generated mineral revenues had they been open to leasing." *Id.* ¶ 22 (C.A. App. A52). In the alternative, Alaska asserted in Count 4 that the withdrawal of land from mineral development had "'taken' Alaska's interest in the revenue to be derived from those lands in violation of the Fifth Amendment." *Id.* ¶ 34 (C.A. App. A55). In Count 5 of its complaint, Alaska alleged that Congress had breached the first of the alleged promises by enacting legislation authorizing the deduction of administrative expenses before calculating MLA revenue shares to the States. Alaska sought approximately $1.7 million in damages for that breach, representing the total amount of such deductions as of June 1993. *Id.* ¶¶ 38-43 (C.A. App. A55-A57).

5. The United States moved for summary judgment, and the CFC granted summary judgment for the United States on all five counts. Pet. App. 2a-46a. For purposes of its analysis, the CFC was willing to indulge, *arguendo*, Alaska's assertion that Section 28(b) should be construed under principles that govern contract interpretation. *Id.* at 34a ("In the final analysis, * * * it is unnecessary to decide with exactitude whether Section 28(b) should be construed as a binding contract or as mere legislation. The court is prepared to assume, along with the State, that Section 28(b) is a contractually enforceable provision of the Statehood Act."). The "real question," the CFC believed, is "what does Section 28(b) mean?"

Preserve and 1.5 million acres of land that were added to the Arctic National Wildlife Refuge. Alaska alleged that all of those areas had significant potential for mineral development. Complaint ¶ 21 (C.A. App. A52).

Ibid. After careful evaluation, the Court found no basis for construing Section 28(b) to contain the promises that Alaska asserted. *Id.* at 34a-45a.[6]

6. The court of appeals affirmed in an unpublished, per curiam opinion "on the basis of the reasoning set forth in the lengthy, detailed, precise and correct opinion of Judge Bruggink." Pet. App. 1a. The court of appeals concluded that, in light of "Judge Bruggink's scholarly opinion," "[n]othing more need be said." *Ibid.*

ARGUMENT

Alaska argues that this Court should grant certiorari to clarify whether Section 28(b) of the ASA should be construed as "ordinary legislation" or as part of a "contract" between the United States and the people of Alaska. Pet. i, 28. As the CFC held, however, there is no need to reach that issue: Even if interpreted as a contract, Section 28(b) cannot reasonably be read to embody the promises that Alaska alleges. This Court ordinarily will not grant certiorari on an "academic" issue that makes no difference to the outcome of the case. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955); see *Conway* v. *California Adult Auth.*, 396 U.S. 107 (1969) (per curiam); cf. *McMahon* v. *United States*, 342 U.S. 25, 28 (1951). Moreover, the CFC's interpretation of Section 28(b) is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore unwarranted.

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[6] The CFC did not reach the United States' affirmative defenses based on the "unmistakability" and "sovereign act" doctrines and, with respect to Counts 1 to 4, the six-year statute of limitations in 28 U.S.C. 2501. Pet. App. 45a-46a.

1. Alaska contends that Section 28(b) of the ASA contains two contractually enforceable promises: (1) that Congress would never enact any changes in the MLA that would decrease Alaska's revenue share from where it stood in 1958, *i.e.*, 90 percent of *gross* proceeds; and (2) that the United States, in a radical departure from the state-federal revenue sharing scheme under the MLA, would assume an affirmative duty to exploit public lands in Alaska for oil and gas development in order to generate royalties for the State.[7] Alaska's contentions cannot be reconciled with the plain language of Section 28(b) or its legislative history, regardless of whether that Section is read as a statute or as a contract.

a. The meaning of Section 28(b) is governed by its plain language, whether it is read as a statute or as a contract. See *McAbee Construction, Inc.* v. *United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996) ("[I]f the [contract] 'provisions are clear and unambiguous, they must be given their plain and ordinary meaning,' * * * and the court may not resort to extrinsic evidence to interpret them.") (citing *Alaska Lumber & Pulp Co.* v. *Madigan*, 2 F.3d 389, 392 (Fed. Cir. 1993)).

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[7] The courts have uniformly held that the MLA does not contain "a positive mandate to lease." *Haley* v. *Seaton*, 281 F.2d 620, 625 (D.C. Cir. 1960); accord *Duesing* v. *Udall*, 350 F.2d 748, 750-751 (D.C. Cir. 1965), cert. denied, 383 U.S. 912 (1966); *Burglin* v. *Morton*, 527 F.2d 486, 488-489 (9th Cir. 1975), cert. denied, 425 U.S. 973 (1976). See also *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965) (MLA leaves "the Secretary discretion to refuse to issue any lease at all on a given tract") (citing *United States ex rel. McLennan* v. *Wilbur*, 283 U.S. 414 (1931)).

The plain language of Section 28(b) is clear, unambiguous, and utterly inconsistent with Alaska's claims. It states as follows:

> Section 35 of the [MLA] is hereby amended by inserting immediately before the colon preceding the first proviso thereof the following: ", and of those from Alaska 52½ per centum thereof shall be paid to the State of Alaska for disposition by the legislature thereof".

72 Stat. 351 (Pet. App. 73a). On its face, Section 28(b) does not purport to make any "promise" or "offer" to the Alaskan people. Even if it were read implicitly as a promise, however, it would merely be a promise to amend one clause in Section 35 of the MLA—the clause which reserved an unrestricted 52½ percent share of mineral leasing proceeds for Alaska—so that it would apply to the *State* rather than the *Territory* of Alaska. In effect, it would be a promise to extend to the new State the same 52½ percent share that Congress had, just one year before, extended to the Territory. Nothing in Section 28(b) indicates that the State of Alaska, unlike all of the other States, would be forever immune from subsequent amendments to the MLA.

Similarly, nothing in Section 28(b) purports to freeze in perpetuity Alaska's revenue share at a particular percentage (or, for that matter, a particular percentage of *gross* rather than *net* proceeds). Cf. *Watt* v. *Alaska*, 451 U.S. 259, 271 n.13 (1981) ("[I]t is almost inconceivable that Congress knowingly would have changed substantially a longstanding formula [under the MLA] for distribution of substantial funds without a word of comment"). Alaska's claim is inconsistent with the analysis in *Watt*, in which this

Court clearly indicated that Congress was free to alter Alaska's revenue share under the MLA at will. See *id.* at 274 (Stevens, J., concurring) ("The question of how to divide the revenue from oil and gas leases on public lands in the Kenai Peninsula is clearly a matter for Congress to decide. If Congress is displeased with the decision[] of this Court * * *, it may promptly reverse [it] by revising the relevant statute[]."); accord *id.* at 285 n.10 (Stewart, J., dissenting).[8]

Alaska's other claim, that Section 28(b) expresses a congressional promise to exploit mineral lands in order to generate royalties for the State, is even more farfetched. The plain language of Section 28(b) does not even hint at such a duty and, as the CFC held, for that duty to arise by implication would violate "two hundred years of law recognizing in the Federal Government a virtually unfettered discretion as to the management of its own lands." Pet. App. 44a

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[8] Even if Section 28(b) could be read to freeze Alaska's MLA share at a particular percentage rate in perpetuity, it would guarantee the State only a *52½ percent* share of MLA proceeds. Section 28(b) makes no mention of a "90 percent" share. On its face, it applies only to Alaska's unrestricted 52½ percent share, which Congress established in 1957 to compensate for the fact that Alaska was not eligible for federal reclamation funds. Section 28(b) does *not* address Alaska's 37½ percent share (for support of public roads and schools), to which Alaska would automatically be entitled under Section 35 of the MLA once it became a State. See 30 U.S.C. 191 (Supp. V 1952 ed.) ("37½ per centum thereof shall be paid by the Secretary of the Treasury * * * to the State * * * within the boundaries of which the leased lands or deposits are or were located"). There is no allegation in this case that Alaska's actual receipts under the MLA have ever dropped below 52½ percent of gross proceeds.

(citing U.S. Const. Art. IV, § 3, Cl. 2; *Beecher* v. *Wetherby*, 95 U.S. 517 (1877); *Gibson* v. *Chouteau*, 80 U.S. (13 Wall.) 92 (1872)). Alaska's claim contravenes the long-standing presumption that Congress will not implicitly relinquish control over the management and disposal of public lands. See *Andrus* v. *Charlestone Stone Prods. Co.*, 436 U.S. 604, 617 (1978); *United States* v. *Sweet*, 245 U.S. 563, 567, 572-573 (1918).[9]

b. Alaska argues that support for its claims can be found, if not in the plain language of Section 28(b), then in the "legislative record" (Pet. 5) and the "circumstances surrounding" that Section's "formulation and enactment" (Pet. 11). Alaska's resort to legislative history, however, is unpersuasive.

(i). Alaska contends that the paramount concern during the statehood debates was the fear that Alaska's small population base would not be financially capable of shouldering the high costs of state governance. Then, according to Alaska, "a new and

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[9] Alaska makes no mention of the state common law principles of oil and gas leasing on which it relied in making that argument below. Alaska argued below that Section 28(b) conveyed to the State the equivalent of what, in certain jurisdictions, is known as a "nonparticipating royalty interest." Alaska then asserted that the United States, as the owner of the residual "executive interest" in federally owned mineral lands in Alaska, assumed an implied duty to "use the utmost fair dealing and diligence in obtaining lease agreements in order to protect the royalty owner's interest." Alaska C.A. Br. 45 (quoting *Federal Land Bank of Houston* v. *United States*, 168 F. Supp. 788 (Ct. Cl. 1958) (construing Texas common law)). As the CFC correctly held, however, the common law of "nonparticipating royalties" has no application to this case. Pet. App. 41a-42a. Alaska does not seek review of that aspect of the CFC's ruling.

lucrative benefit was added to the statehood package." Pet. 3. In March 1957, Senator Barrett of Wyoming proposed an amendment to the Senate statehood bill that would "give * * * the State of Alaska-to-be ninety percent of the income from the minerals under the Leasing Act royalties that come in *from now on out.*" Pet. 4 (quoting Sen. Barrett in *Alaska Statehood: Hearings on S. 49 and S. 35 Before the Senate Comm. on Interior and Insular Affairs*, 85th Cong., 1st Sess. 31 (1957) (*Alaska Statehood Hearings*) (C.A. App. A340)) (emphasis added by petitioner). Alaska argues that this "90 percent" provision was, in essence, the *sine qua non* of the statehood bargain—the term that ultimately "induced" (Pet. App. 36a; Alaska C.A. Br. 22, 29, 32) a reluctant Alaskan people to "assume the burdens" (Pet. 25) of state governance.[10]

Alaska's reading of the record is flawed for a number of reasons. At the outset, Alaska overstates the extent to which Alaska's alleged inability to shoulder the costs of state governance was viewed as a major obstacle to statehood. By 1958, the Territory of Alaska was already providing "the basic services of State government except those precluded by the organic act," while at the same time experiencing a net budget *surplus*—notably without any need for a sales tax or a significant property tax. S. Rep. No. 1163, 85th Cong., 1st Sess. 13 (1957) (C.A. App. A229).

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[10] Alaska attempts to attach even greater significance to the Barrett proposal by asserting that it followed "on the heels of Alaska's first major oil strike." Pet. 3. Alaska's chronology is backwards. Oil was discovered on the Kenai peninsula in July 1957, several months after Barrett introduced his amendment. See Pet. App. 84a.

For that reason, the Senate Report declared that the Territory was in "an enviable fiscal position." *Ibid.*[11]

Alaska also exaggerates the relative significance of Section 28(b) in the overall mix of property grants and revenue sharing provisions contained in the statehood bill. As noted above, by far the most significant potential source of revenue for the new State was the enormous grant of public lands, including lands rich in mineral deposits. Furthermore, although the statehood act's revenue-sharing provisions would provide a significant additional source of revenue for the State, Section 28(b) was only one of numerous such provisions in the Act, and nothing in the legislative history cited by Alaska indicates that Section 28(b) was, unique among those provisions, intended to be an "irrevocable" or "unalterable" grant.

Moreover, Alaska fails to identify a single statement in the legislative record that expressly acknowledges either of the promises that Alaska alleges. At best, the statements on which Alaska relies acclaim the statehood bill's revenue sharing provisions (of which Section 28(b) was only one) as an important means of "offsetting" the costs of statehood. They declare, for instance, that such provisions will "have a tremendous impact on the ability of the new State to provide the essential resources to support itself." Pet. 6 n.4 (quoting Sen. Jackson, 104 Cong. Rec. 12,208 (1958) (C.A. App. A638)). It does not

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[11] Similarly, the Department of the Interior noted in a memorandum submitted to Congress in 1958 that Alaska's territorial government had the second highest per capita revenue in the Nation and was the only state or territorial government in the Nation with no outstanding indebtedness. 104 Cong. Rec. 12,332-12,333 (1958) (C.A. App. A674-A675).

follow, however, that Congress intended to render Alaska forever immune from subsequent changes to the MLA. While Section 28(b) was obviously intended to contribute to the new State's financial well-being, it accomplished that goal by simply providing that the State could participate in the pre-existing revenue sharing formula that had been extended to the Territory in 1957.[12]

Finally, Alaska's portrayal of Section 28(b) as an "inducement" is undermined by the fact that, by the time the ASA was enacted, Congress had already amended the MLA to raise Alaska's share of mineral leasing proceeds to 90 percent. Thus, the Alaskan government would be entitled to 90 percent of proceeds under the MLA whether or not the people of Alaska voted in favor of statehood.

(ii). Alaska fails to address three crucial pieces of legislative history, each of which undermines its arguments. First, as Alaska notes (Pet. 4), Section 28(b) had its genesis in Senator Barrett's amendment to the Senate statehood bill, introduced in March 1957. See *Alaska Statehood Hearings* 67 (C.A. App.

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[12] Alaska cites a statement in the Senate Report recognizing that "[s]ome of the additional costs connected with statehood will be met by granting the State a reasonable return from Federal exploitation of resources within the new State." Pet. 6 n.4 (citing S. Rep. No. 1163, *supra*, at 3 (C.A. App. A224)). That statement, however, refers not just to Section 28(b), but also to provisions in the statehood bill that would provide the State with 70 percent of net proceeds from sales of seal and sea-otter furs from the Pribilof Islands; 90 percent of coal leasing profits; 5 percent of net proceeds from sales of public lands; and 37½ percent of proceeds derived from national forests. More to the point, it says absolutely nothing about any of those revenue shares being irrevocable or lasting in perpetuity.

A358). The Barrett amendment, however, was modeled after a similar bill, then being considered in the House, to amend the MLA through stand-alone legislation—the bill Congress later enacted in July 1957 as Public Law 85-88. The only difference was that Senator Barrett believed that "the statehood bill was the proper place to insert such a provision." *Ibid.* Significantly, Senator Barrett acknowledged that the purpose of his proposal, like that of the House bill, was to redress the perceived "unfairness" in the treatment of Alaska vis-à-vis the reclamation States under the *then-existing* MLA framework. *Id.* at 30-31, 68 (C.A. App. 340, 359). Furthermore, Senator Barrett understood that Alaska's 52½ percent share would be subject to change if Alaska's disparate treatment under the MLA ceased.[13]

Second, a version of Senator Barrett's amendment was also included in the House statehood bill (again, before the enactment of Public Law 85-88). As the House Committee Report accompanying that bill explained, the purpose of that provision was to rectify the perceived disparate treatment of Alaska under the then-existing MLA revenue-sharing formula:

> [S]ection 28 amends the [MLA] by granting 52½ percent per annum of the net proceeds * * * to the State of Alaska for disposition by the legislature thereof.

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[13] Senator Barrett introduced a letter to Congress from the Assistant Secretary of the Interior, which stated that, "[i]f the reclamation laws should be extended to Alaska, the Department *would give consideration to the desirability of having the additional 52½ percent of the proceeds derived from Alaska paid into the reclamation fund.*" *Alaska Statehood Hearings* 68 (C.A. App. A359) (emphasis added).

> *The payment of these proceeds is recommended in return for Alaska not being covered by the Reclamation Act of 1902, as amended.*

H.R. Rep. No. 624, 85th Cong., 1st Sess. 8 (1957) (C.A. App. A280) (emphasis added). See also *id.* at 23 (C.A. App. A287). Conspicuously absent is any indication of an intent to render Alaska immune from any future changes in the MLA.

Finally, the Senate Committee Report of August 29, 1957, is highly probative, as it is the only significant piece of legislative history that was published after Congress enacted Public Law 85-88. In its analysis of Section 22 of the Senate statehood bill (the precursor to Section 28(b) of the ASA), the Report explained that:

> Section 22 is an amendment adopted by the committee for the purpose of authorizing payment to Alaska of 90 percent of the proceeds derived in Alaska under the [MLA] and the Alaska Coal Leasing Act. *This merely applies the provisions of [Public Law 85-88] to the State of Alaska, whereas it presently applies to the Territory.*

S. Rep. No. 1163, *supra*, at 29 (C.A. App. A237) (emphasis added). See also *id.* at 3 (C.A. App. A224) ("Section 22 of the bill extends to the State the provisions of [Public Law 85-88], which was approved July 10 of this year. * * * Without section 22 in the bill, the new State would not be within the purview of the 1957 act."). The Senate Report's analysis is powerful evidence that Section 28(b), whether construed as a bargained-for promise or as ordinary legislation, was merely intended to substitute the State of Alaska into the already-existing MLA formula that had been

extended to the Territory of Alaska under Public Law 85-88.

2. Alaska asserts that the CFC erred by "focus-[ing] almost exclusively on *Congress'* intent in enacting the Statehood Act," while disregarding the "intent and understanding" of the Alaskan people when they ratified the statehood "compact." Pet. 23. It contends that the intent of *both* parties "is entitled to equal consideration." *Ibid.* Alaska argues that this Court should grant certiorari "to clarify the weight that should be given to such extrinsic evidence of the parties' intent in construing statehood compacts." *Ibid.* Alaska's argument, however, is without merit.[14]

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[14] This Court has had several occasions to construe the ASA, yet in each case it has applied ordinary principles of statutory interpretation, looking exclusively to congressional intent. See, *e.g.*, *United States* v. *Alaska*, 117 S. Ct. 1888, 1909-1912, 1919 (1997); *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 65-71 (1962); *Metlakatla Indian Community* v. *Egan*, 369 U.S. 45, 56-59 (1962). Notably, both *Kake* and *Metlakatla* involved construction of Section 4 of the ASA, the sole provision in the Act that purports to establish a "compact." Yet, both decisions turned on congressional intent, with no suggestion that the understanding of Alaskans was relevant. While the Court in *Kake* stated that "Section 4 must be construed in light of the circumstances of its formulation and enactment," 369 U.S. at 65, the Court there was referring to a standard tool of statutory construction whose purpose, ultimately, is to gain insight into what Congress intended.

Indeed, Alaska cannot cite a single case in which this Court has construed any statehood Act without looking exclusively to congressional intent. Alaska, for example, cites (Pet. 14) *Andrus* v. *Utah*, 446 U.S. 500, 507 (1980), in which this Court said that certain land grant provisions in the Utah enabling Act embody a " 'solemn agreement' which in some ways may be analogized to a contract between private parties," but the

At the outset, Alaska assumes that Section 28(b) is a part of the "compact" that was the subject of the Section 8 statehood referendum. That assumption is incorrect. Section 8 put before the people three specific propositions. The third proposition, which is the linchpin of Alaska's argument (Pet. 16), asked for the people's consent, *inter alia*, to "[a]ll provisions of the [ASA] * * * prescribing the terms or conditions of the *grants of lands or other property* therein." § 8(b), 72 Stat. 344 (Pet. App. 59a) (emphasis added). The highlighted phrase, however, does not encompass Section 28(b). The only "grants of property" in the Statehood Act are those contained in Section 6, a fact confirmed by Section 5. See 72 Stat. 340 (Pet. App. 50a-51a) ("Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title.").[15]

Furthermore, Section 8(b) of the Statehood Act provided for the people of Alaska to consent not only to the grants of lands or other property to Alaska, but

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Court in that case nonetheless looked exclusively to Congress's intent in construing the meaning of those provisions. See *id.* at 507-510, 520. Alaska's theory of interpretation is thus without any support in this Court's jurisprudence. In any event, as explained *infra*, there is no need to reach that issue because it simply makes no difference in this case. Alaska's claims fail, even under Alaska's own theory of interpretation.

[15] If the text were not clear enough, the Senate Committee Report, which discusses Section 6 (and *not* Section 28(b)) under the heading, "Grants of Land and Other Property," makes clear that "Section 6 is the section authorizing grants of property to the new State." S. Rep. No. 1163, *supra*, at 16 (C.A. App. A231). As Section 28(b) was not ratified by the Alaskan people, the popular understanding of that provision's meaning is not directly relevant, even under Alaska's logic. See, *e.g.*, Pet. 19 n.11.

also to the provisions of the Statehood Act "reserving rights or powers to the United States." 72 Stat. 344 (Pet. App. 59a). As noted above (see pages 4-5, *supra*), Section 4 of the Statehood Act provides that the State disclaims all right and title to lands or other property not granted by the Act, "the right or title to which is held by the United States or is subject to disposition by the United States"—language that unquestionably includes mineral lands of the United States that are subject to leasing under the MLA—and that such lands or property "shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority," except to the extent Congress otherwise provided. 72 Stat. 339 (Pet. App. 50a). That express retention of absolute jurisdiction and control over mineral lands held by the United States cannot be squared with petitioner's assertion that the United States made an enforceable and perpetual promise to develop those minerals for the benefit of Alaska and to condition the United States' disposition of those minerals on the payment of 90% of royalties to Alaska.

In any event, the CFC did not, as Alaska asserts, disregard Alaska's extrinsic evidence in this case. To the contrary, after careful consideration of that evidence, the CFC determined that it was not probative. Alaska's evidence primarily consists of speeches delivered by Secretary of the Interior Seaton that, according to Alaska, reflect the Alaskans' understanding of the referendum propositions. See Pet. App. 80a-94a. The CFC correctly found that "[t]here is nothing in [Secretary Seaton's] statements specifically promising that Alaska would receive 90 percent of mineral leasing revenues in perpetuity or that the Federal Government would actively develop [the

Arctic National Wildlife Refuge] or other areas for leasing." *Id.* at 36a. Rather, the Secretary's comments confirm that the effect of Section 28(b) was merely to continue Alaska's pre-existing treatment under the MLA. See, *e.g.*, *id.* at 84a (since the passage of Public Law 85-88, "the Territory has received 90 percent of all oil lease revenues; *the State of Alaska will continue to do so*") (emphasis added); *id.* at 94a (ASA "*reaffirms* Alaska's preferential treatment in receiving 90 percent of all revenues from oil, gas, and coal leasing on the public domain") (emphasis added).[16]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[16] Because Alaska's extrinsic evidence is nonprobative, there is no need to remand this case for "further factual development as to the parties' intent." Pet. 22 n.13. For the same reason, there is no need to hold this case pending disposition of *New Jersey* v. *New York*, No. 120, Original—a case concerning an interstate compact, not a statehood enabling Act—regardless of whether that decision will "address the appropriate weight to be given extrinsic evidence in construing [interstate] compacts." Pet. 23 n.14.